Supreme Court, U.S.
FILED

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No.

In The

In The Supreme Court of the United States

October Term 1997

John K. Whiteford MD

Petitioner

v.

Commonwealth of Pennsylvania; Bureau of Professional and Occupational Affairs

Respondents

On Petition for a Writ of Certiorari to the Third Circuit Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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Pro se
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38 pp

I. IS THIS CASE AN EXCEPTION TO THE YOUNGER ABSTENTION APPLIED BY DISTRICT COURT?

II. WERE STATUTE CONSTITUTIONAL VIOLATIONS ADDRESSED BY PENNSYLVANIA STATE COURTS?

III. UNDER WHAT CIRCUMSTANCE CAN THE COMPETENT, LAW-ABIDING PHYSICIAN BE LIABLE TO PAY THE MALPRACTICE JUDGMENTS OF AN UNRELATED OTHER?

IV. IS A STATUTE MANDATING SUCH MALPRACTICE JUDGMENT LIABILITY VIOLATIVE OF EXPRESSED CONSTITUTIONAL RIGHTS GUARANTEED THE COMPETENT, LAW-ABIDING PHYSICIAN BY THE UNITED STATES CONSTITUTION?

V. IS MANDATORY MALPRACTICE INSURANCE A RATIONAL, CONSTITUTIONAL MANDATE?

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PENNSYLVANIA STATE COURTS AND AGENCIES:

Cite page		Order date
1,3	Common Pleas Court GD12855-96	11-01-96
1,3	Commonwealth Court 1152 MD 1996	03-24-97
1,3	Supreme Court Case No. 216 W.D.1997	09-03-97
1,3	Bureau of Professional and Occupational Affairs Hearing Examiner No.300-49-96	11-18-96
1,3	State Board of Medicine Review No. 96-49-01453	01-30-97
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1,4	State Board of Medicine Suspension	06-04-97
1,4	Comwlth. Court denies Reconsideration	07-28-97

FEDERAL COURTS:

1,4	District Court for Western Pennsylvania Case No. 1949-96	01-07-97
1,4	Court of Appeals-Third Circuit Case No. 3080-97	09-03-97
1,4	Rehearing Denied-Third Circuit	09-25-97

STATEMENT OF JURISDICTION

This Complaint of violations of expressed U.S. Constitutional prohibitions in the Pennsylvania Health Care Services Malpractice Act of 1975 was filed in Common Pleas Court (GD12855-96) on 09-03-96, and transferred to Commonwealth Court (1152 MD 1996) where it was dismissed. The Supreme Court denied an Appeal (216 W.D. 1997) on 09-03-97. No address to the constitutional questions raised was given in the transfer, dismissal or denial. A Petition for a Writ of Certiorari to the Supreme Court is permitted under 28 U.S.C. 1257.

The same Complaint brought in District Court for Western Pennsylvania (Case1949-96) on 10-24-96 was dismissed under Younger (1971) abstention principles and the dismissal was upheld by third Circuit Appeals Court 09-03-97. This case embodies three exceptions to a Younger abstention:

1. Money damages are requested in the Amended Complaint filed 11-15-96 and must be heard under the precedent of Williams v. Red Bank Board of Education (662 F.2d 1008) in the Third Circuit 1981.
2. This Statute is a bad faith exception to Younger (401 U.S. 37,91s Ct. 746, 1971): the Statute is "so flagrantly and patently violative of expressed Constitutional prohibitions in every clause, sentence and paragraph" as to be unenforceable.
3. The State courts did not address the constitutional questions, a requirement for Younger federal abstention.

For refusing to pay the Professional Liability Catastrophic Loss Fund Emergency surcharge of $2,281.00 in 1995, my medical license was unconstitutionally suspended June 4, 1997 since no word of address to my defense that the Fund is unconstitutional has issued from the Board of Medicine Hearing Examiner, Board of Medicine, Commonwealth Court or the Supreme Court of Pennsylvania as each in turn enforced the Statute.

CONSTITUTIONAL PROVISIONS , STATUTES, CASES AND REFERENCES

PENNSYLVANIA STATUTES IN QUESTION:

1. Health Care Services Malpractice Act of 1975
P.L. 390 of 1975, 40 P.S. 1301.101 et seq.

Section 1301.701(a): " Every health care provider as defined in this act, practicing medicine or podiatry or otherwise providing health care services in the Commonwealth shall insure his professional liability or provide proof of self-insurance in accordance with this Section."

Section 1301.701 (d): "There is hereby created a contingency fund for the purpose of paying all awards, judgments and settlements for a loss or damages against a health care provider entitled to participate in the fund as a consequence of any claim for professional liability brought against such health care provider as a defendant or an additional defendant to the extent such health care provider's share exceeds his basic coverage insurance in effect at the time of occurrence as provided is subsection (a) (1). Such fund shall be known as the "Medical Professional Liability Catastrophe Loss Fund'', in this Article VII called the "Fund".

Section 1301.701 (e) (1): "The Fund shall be funded by the levying of an annual surcharge on or after January 1 of every year on all health care providers entitled to participate in the Fund."

CONSTITUTIONAL PROVISIONS , STATUTES, CASES, AND REFERENCES (CONT.)

1. (cont) Health Care Services Malpractice Act of 1975:

> Section 1301.701 (e) (4): "The annual and emergency surcharges on health care providers and any income realized by investment or reinvestment shall constitute the sole and exclusive sources of funding for the Fund."
>
> Section 1301.701 (f): "The failure of any health care provider to comply with any of the provisions of this Section or any of the rules and regulations issued by the director shall result in the suspension or revocation of the health care provider's license by the licensure board."

2. Pennsylvania P.L. 135 OF 1996

> Renews, inter alia, the mandates of 1301.701 et seq. verbatim.

FEDERAL STATUTES:

1. 42 U.S.C. 1983
2. 28 U.S.C. 1257, 1331, and 1343
3. Health Care Quality Improvement Act of 1986, Title IV of P.L. 99-960 (creating the National Practitioner Data Bank)

CONSTITUTION:

1. FOURTEENTH AMENDMENT-Due Process and Equal Protection Clauses
2. FOURTEENTH AND FIFTH AMENDMENT-Right to Work and "Taking"
3. PROHIBITION OF BILLS OF ATTAINDER FOR STATES-Article 1, Section 10, Clause 1
4. SEPARATION OF POWERS

CONSTITUTIONAL PROVISIONS , STATUTES, CASES, AND REFERENCES (CONT.)

TABLE OF CASES

1. Williams v. Red Bank Board of Education
   662 F.2d 1008 (1981)
2. Younger v. Harris
   401 U.S. 37,91s. Ct. 746 (1971)
3. McCoy v. Pennsylvania
   37 Pa. Comwlth. 530, *535, 391A. 2d 723 (1978)
4. NAACP v. Alabama, 377 U.S. 288, 307, 84 S. Ct. 1302, 12 L. Ed. 2d 325 (1969)

TABLE OF REFERENCES

1. National Practitioner's Data Bank 1995 Annual Report
2. The AMA and US Health Policy, Chicago Press 1984
3. The Socioeconomic Aspects of Medical Care 1996, AMA
4. PHICO Malpractice insurance rates by Specialty 1995

STATEMENT OF THE CASE

When Petitioner refused to pay the 1995 Pennsylvania CAT Fund emergency surcharge of $2,281.00 in November 1995, the CAT Fund reported the failure to the Pennsylvania Bureau of Professional and Occupational Affairs.

Petitioner filed an original jurisdiction Complaint in Common Pleas Court claiming the statute requiring CAT Fund surcharge payment was unconstitutional and seeking Preliminary Injunction against license suspension. This Complaint was transferred to Commonwealth Court case 1152 MD 1996, amended to include Statute violations of Due Process, Equal Protection, Right to Work, "taking", acts as a Bill of Attainder, and is an Irrational mandate, was then dismissed 03-24-97. Pennsylvania Supreme Court denied Petition for Appeal 09-03-97. The transfer, dismissal and denial are all without address to the Constitutional issues of the Complaint or grant of the Preliminary Injunction requested.

This Complaint, that the Statute was unconstitutional, violating Due Process, Equal Protection, Right to Work, "taking" acts as a Bill of Attainder, and is an Irrational mandate, was filed in the District Court for Western Pennsylvania, Case No. 1949-96 on 09-24-96 (jurisdiction under 28 U.S.C. 1331 and 1343 for Complaint based on 42 U.S.C. 1983) requesting Preliminary Injunction against license suspension. Injunction was denied. When no response from defendants was received for any filing, a Motion for Default Judgment was made 12-17-96 and District Court dismissed the case, citing Younger abstention principles. An Appeal to the Third Circuit upheld the abstention 08-05-97. On 09-25-97 Third Circuit denied a rehearing.

In a Hearing before a State Board of Medicine examiner 10-29-96. Petitioner argued that the statute requiring payment to the CAT Fund was unconstitutional, and acted as a Bill of Attainder, but a license suspension of 14 days and civil penalty of $685 was assessed, enforcing the statute without addressing it's constitutionality.

STATEMENT OF THE CASE (CONT.)

A Petition for Review to the State Board of Medicine, citing constitutional violations of Due Process, Equal Protection, Right to Work, "taking", acting as a Bill of Attainder and an Irrational mandate, resulted in an affirmation of the suspension and increased the fine to $1000, but "could" not address the merits of the constitutional argument in its decision.

A Petition for Review to Commonwealth Court 482 C.D. 1996, with the same constitutional questions, was quashed for errors in the format of the Appeal Brief, June 3, 1997, "without reaching the merits".

On June 4, 1997, one day after Commonwealth Court's "quashing" Petitioner's medical license was suspended. Petition for Reconsideration and Supersedeas was denied by Commonwealth Court July 28,1997.

Another Petition for Appeal and Supersedeas was filed in Pennsylvania Supreme Court 07-01-97 (411 W.D.1997), even though Supreme Court has already denied Appeal for the same Complaint in Case 216 W.D. 1997 on 09-03-97.

ARGUMENT

The Health Care Services Malpractice Act of 1975(P.L. 390, 40 P.S. 1301.101 et seq.) and its replacement Act 135 of 1996 make malpractice insurance mandatory for physicians, and other health care providers defined in the Acts. The 1975 Act created the Professional Liability Catastrophic Loss Fund ("CAT Fund", 40 P.S. 1301.701 et seq.) to pay any malpractice judgments in excess of $100,000 for any liable "provider" designated by the Act, and the Fund is preserved intact in the 1996 Act 135.

The CAT Fund is financed by surcharge, to providers designated by the Act, on their malpractice insurance premium required by the Act. Both, 1975 and 1996 Acts create a requirement for suspension or revocation of medical license for failure to purchase malpractice insurance or pay the CAT Fund surcharges.

There is no such license revocation or suspension mandated for malpractice in Pennsylvania.

I. IS THIS CASE AN EXCEPTION TO THE YOUNGER ABSTENTION APPLIED BY DISTRICT COURT?

Yes. This question is answered in the affirmative by THE STATEMENT OF JURISDICTION. Money damages requested in the 11-18-96 Amended Complaint in District Court for constitutional rights violations require the federal courts hear this case(Williams v. Red Bank board of Education 1981). The flagrant constitutional violations making this an exception to Younger are expanded under question IV and State failure to address constitutional issues under question II.

ARGUMENT (CONT.)

II. WERE STATUTE CONSTITUTIONAL VIOLATIONS ADDRESSED BY PENNSYLVANIA STATE COURTS?

No. This question is answered in the negative by STATEMENT OF THE CASE. The record shows that any confidence the District Court had that State courts would address my constitutional complaint was misplaced.

III. UNDER WHAT CIRCUMSTANCE CAN THE COMPETENT, LAW-ABIDING PHYSICIAN BE LIABLE TO PAY THE MALPRACTICE JUDGMENTS OF AN UNRELATED OTHER?

None. Court judgments for any trespass, civil or criminal, cannot be transferred by statute to any other than the accused. Guilt or liability for a trespass, is individual and must be either admitted or proven in court. It cannot be legislated.

IV. IS A STATUTE MANDATING SUCH MALPRACTICE JUDGMENT LIABILITY VIOLATIVE OF EXPRESSED CONSTITUTIONAL RIGHTS GUARANTEED THE COMPETENT, LAW-ABIDING PHYSICIAN BY THE UNITED STATES CONSTITUTION?

Yes. At once, the Health Care Services Malpractice Act of 1975 and it's renewal, Act 135 of 1996, both impose direct financial liability for all Pennsylvania malpractice judgments onto providers designated by the Acts, and create the penalty of license suspension for failure to pay. The constitutional violations are:

ARGUMENT (CONT.)

IV-A. No legislature has that power over court judgments. This court judgment transfer violates the Separation of Powers.

IV-B. Due Process is afforded the accused in arriving at the malpractice judgment, but denied those legislated to pay it. High cost burdens the medical practice right.

IV-C. Equal Protection fails when this financial burden is applied to providers designated, since they are no more liable for malpractice trespass than any other citizen of Pennsylvania who has not been afforded Due Process. The Acts legislate general liability by profession which is the same as legislated guilt by ancestry.

IV-D. The high cost of malpractice premiums, $10,000 to $122,000 (basic coverage + CAT Fund surcharge + Cat fund emergency surcharge-PHICO rates in appendix) in 1995 for Pennsylvania depending on specialty and location, is "taking" medical practices and violates physician's Right to Work. Prior the these Acts a physician could work as long as competent, now as long as he is affluent. The privilege of small practice, as we age and energy wanes, or as we prefer, is extinguished by the large malpractice premium required to see even one patient and new solo practice is even more burdened. The Acts make "financial security a precedent to the practice of medicine" (see Crumlish & Mencer dissent of McCoy {37 Pa. Cmwlth. 530, *535, 391 A. 2d 723, 1978}decision)

IV-E. These Acts are hardly an exercise of the police power. They are the legislative distribution of guilt/liability for malpractice judgments to an identified group, inflicting pains and penalties in a bald attempt to get more money to pay judgments for individual wrongdoing. They are Bills of Attainder and prohibited. It will be difficult to

escape Attainder designation by claiming no intent to punish when paying court punishments is the mandate.

V. IS MANDATORY MALPRACTICE INSURANCE A RATIONAL, CONSTITUTIONAL MANDATE?

The Health Care Services Malpractice Act was passed in 1975 in response to a decision by the insurance industry that malpractice was an "uninsurable risk", the premiums required would be more than physicians would pay. There was a nationwide threat to abandon writing malpractice insurance in every state, including Pennsylvania (McCoy decision text). Pennsylvania responded by making the insurance mandatory, which could not conceivably change the situation except that the "uninsurable risk" was now the unlimited burden of providers and the insurer's risk was limited. The Act made sure providers would bear the burden by creating the penalty of license suspension for non-compliance, an unusual punishment since license suspension was not, and is not, required for committing malpractice. The Act creates a charity that preserves the malpracticing physician at the direct expense of those who do not malpractice, and takes the license of these competent physicians when market forces, or waning energy, reduces practice income to less than the now 10 times higher than 1975 cost of the malpractice premium.

The "Purposes" stated unambiguously in Section 102 of the Act were to keep malpractice insurance "affordable", "available" and ensure "compensation of malpractice victims".

"Affordable" has failed, just as the insurance companies said it would in 1975. Premiums are 10 times 1975 levels nationally and in Pennsylvania (The AMA and US Health Policy, page 512 and AMA- Socioeconomic Characteristics of Medical Practice 1996).

"Available", at any cost is irrational when 90% of the cost is not victim compensation, but overhead or maintenance on the insurance vehicle legislatively chosen for the

"uninsurable risk". This overhead is what makes the risk uninsurable, a point missed entirely by the Pennsylvania Legislature in 1975, but central to the insurance companies decision not to insure.

Lastly, failure of compensation to even one malpractice victim had not occurred in Pennsylvania in 1975, and 22 of 67 counties had not even recorded a malpractice claim (McCoy decision text). Actual compensation to malpractice victims in 1995 equaled less than 10% of the total 1995 malpractice premiums paid nationally, and in Pennsylvania (National Practitioners Data Bank 1995 annual Report, Table 6 & Table 10), or the same amount being paid in total premiums by providers in 1975 (The AMA and US Health Policy, page 512).

The Acts have plainly chosen the wrong vehicle to ensure malpractice victim compensation. The mandate to purchase malpractice insurance includes a mandate to pay all other unrestrained and uncontrolled insurance costs above victim compensation. These non-victim compensation costs now comprise 90% of premium costs, an irrational percentage that is responsible for all of the increase in premiums from 1975 until the present. The AMA has monitored and reported total national malpractice premium costs for more than 30 years: one billion in 1975, 10 billion in 1995. The increase is either unrestrained profit or unrestrained costs. Since September 1990, the National Practitioner's Data Bank (NPDB) has logged and reported all malpractice payments on behalf of any practitioner. The NPDB 1995 Annual Report shows all years from 1990 to 1995. Each of those full years payouts total 2 billion dollars nationally, of which the victims could be expected to actually receive 1 billion. Payouts in Pennsylvania are 170 million dollars annually, or 85 million if victims receive 50%. Malpractice premium payments in

ARGUMENT (CONT.)

V. IS MANDATORY MALPRACTICE INSURANCE A RATIONAL, CONSTITUTIONAL MANDATE ?

Pennsylvania totaled 807 million dollars (PHICO rates x specialty ratio x 32,035 providers) for providers in 1995. Despite the unchanging amount of payouts recorded by NPDB each year from 1990 to 1995, malpractice insurance rates tripled for me in Pennsylvania. Malpractice premium rates are not driven by judgments, but by the unrestrained 90% other costs inherent in the insurance.

Without some response from the CAT Fund, or Commonwealth of Pennsylvania to Interrogatories filed, and there is no response to anything filed, one can only speculate as to what the 90% overhead costs of malpractice insurance are. Whatever is wrong in the soaring costs of malpractice insurance, is most seriously wrong in the CAT Fund, whose surcharges in 1975 were 10%, rising to 256% in 1995, while Basic insurance premiums increased 5-fold. With 1995 payouts for providers totaling $170 million for Pennsylvania by NPDB report, and Basic insurer covering the first $200,000 of 1106 payouts, it is mysterious that the CAT Fund developed a need for an extra $107 million demanded in the emergency surcharge.

The median national payout for a practitioner's malpractice judgment is $50,000, and the mean is $148,000 (NPDB data-Table 10). For Pennsylvania annual median / mean is $85,000 / $153,000. As a practical financial mattter, a "provider", given choice, would prudently choose to pay judgments over the current annual high malpractice premiums. Or, most prudently, choose to do no harm and not malpractice.

The cost of defending failed claims of malpractice must be high. Malpractice judgments affect 1.7% of physicians annually in this nation by NPDB data, but, the claim of malpractice is made against 10% of physicians annually nationwide (AMA data). In Allegheny County, Pennsylvania

V. IS MANDATORY MALPRACTICE INSURANCE A RATIONAL, CONSTITUTIONAL MANDATE ?

claims of malpractice are entered against 20% of County physicians annually in the County computerized index of cases(500 claims naming 1000 physician defendants in 1995 of 5200 physicians in Allegheny County), and judging from higher malpractice premium rates, Philadelphia County must have a claim rate of 30% annually. If high premiums are not driven by hidden costs, or unrestrained profit, they seem most directly connected to failed claims and the expense of defense, for which expense the Acts make providers financially responsible.

The claims of malpractice are inexpensive to file, very expensive to defend, offer great rewards if successful, have no significant penalty if unsuccessful and profit is as good a motive as any to file a claim. In other words, claims are an unrestrained cost.

Still, 98.3% of U.S. physicians do not malpractice annually and 87% of malpractice claims are found to have no merit. There are 1,485,000,000 U.S. physician-patient visits annually. In the worst year of NPDB recording, 1994, there were 14,938 U.S.malpractice settlements or judgments for physicians. That is 99,410 visits before a malpractice occurs. The "average" physician sees 2400 patients annually, so there is one judgment for every 41 physician practice years, or one judgment every 232 patient lifetimes. These numbers are the proper incidence, or risk, of malpractice and show that even the liable physician in any year did some good. Medicine can be very difficult and none have shown that medicine can be practiced by humans on humans without error. The physician, between the patient and all harm injury or illness can do, is precariously positioned, but in total, is an asset to preserve. A focus entirely on harm is not justified.

Individually, there are rare physicians who do not meet the standard of care, but this legislation preserves them (see NPDB 1995 Report Table 5: Multiple judgments) and "takes"

ARGUMENT (CONT.)

V. IS MANDATORY MALPRACTICE INSURANCE A RATIONAL, CONSTITUTIONAL MANDATE ?

the competent, but financially weakest, for failure to subsidize malpractice, an irrational, direct consequence of the Acts.

Perhaps we can do better, but this legislation does not address reducing the incidence of malpractice or the claims of malpractice and adds a mountain of unrestrained overhead costs. It is an irrational Act, attempting to preserve insurance for an uninsurable risk without regard to cost and unconstitutionally mandating all of a similar profession liable for an individual's wrongdoing. The purpose of ensuring compensation of malpractice victims is not unreachable, since it comprises even now only 10% of the current cost, but it is unreachable using the insurance vehicle and irrational. The Legislature's power to protect must not be applied so overbroadly it infringes Constitutional prohibitions (Mencer, McCoy dissent).

By any standard of review, the Health Care Services Act of 1975 and Act 135 of 1996 are unconstitutional Acts.

CONCLUSION

For the foregoing reasons I ask the court to:

1. Grant Supersedeas restoring my medical license unconstitutionally suspended June 4, 1997.
2. Declare the Health Care Services Malpractice Act of 1975, and Act 135 of 1996 unconstitutional and restore all license taken under these Acts.
3. Equity compensation:
   A. Return to me all payments I have made to the Catastrophic Loss Fund and malpractice insurance payments since 1975 at statutory interest.
4. Compensatory damages:
   A. For the Commonwealth's dilatory action in not responding to my federal suit and never addressing my constitutional Complaint in any State court, Agency or filing. Time & costs.
   B. For economic harm license suspension has done to me personally and to my medical practice.
5. Punitive damages:
   A. For 22 years of violating so many of my guaranteed constitutional rights.
   B. For unconstitutionally and vexatiously enforcing suspension of my medical license without any address to my just constitutional complaint.
   C. For the Bankruptcy I must file this month, since I cannot meet my financial obligations until my license is restored.

Respectfully submitted: John K Whiteford MD

John K Whiteford MD

Respondent:

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APPENDIX - A1

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

JOHN K. WHITEFORD Petitioner	) No. 216 W.D. ALLOC 1997)
v.	) Petition for Allowance of) Appeal from the Order and) Memorandum Opinion of
COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS)	) Commonwealth Court)))

ORDER

PER CURIAM

And now, this 3rd day of September, 1997, the Petition for allowance of Appeal and the Petition to Allow a Reply Brief are DENIED.

A true Copy Candace Y. Fry
as of: September 3, 1997
Attest: s/ Candace Fry
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX-A2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOHN K. WHITEFORD Petitioner v. COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS)	))))))))))	No.1152 MD 1996

MEMORANDUM AND ORDER

Before the Court are preliminary objections filed by respondent to a petition for review filed by petitioner in our original jurisdiction.

The case in original jurisdiction initially was begun by petitioner as an equity proceeding in the Court of Common Pleas of Allegheny County which on October 28, 1996 granted the motion of respondent, the Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affairs, to transfer the matter to the Commonwealth Court.

During the pendency of the original jurisdiction case and under mailing date of November 18, 1996, the hearing examiner for the State Board of Medicine ordered petitioner to pay C.A.T. fund emergency surcharge on or before January 12, 1997, imposed a 12 day suspension and a fine of $685 as well as an indefinite suspension until the surcharge and fine were paid in full. Petitioner timely appealed to the board, which under mailing date of January 31, 1997, modified the sanctions to a 14 day suspension and $1,000

fine. The order became effective 30 days from mailing or March 2, 1997.

Petitioner filed a motion to stay the suspension and surcharge in the original jurisdiction case without having filed a petition for review sur appeal. The stay in the original action was denied on February 20, 1997, without prejudice to the right of petitioner to file a timely appeal from the suspension and surcharge adjudication. A timely petition for review sur appeal was filed with a new petition for stay which was granted.

Preliminary objections filed by respondent to the case at original jurisdiction object that the Declaratory Judgments Act, 42 Pa. C.S. sections 7531-7541, is not available to petitioner in a matter of original jurisdiction, that petitioner has pled no facts entitling him to a preliminary injunction, that the Commonwealth Court has appellate rather than original jurisdiction over the issues presented and that the petitioner has not exhausted his administrative remedies.

The preliminary objections to the case of original jurisdiction are well taken and will be sustained. The case in original jurisdiction will be dismissed. the petition for review on appeal still is alive and will proceed in due course subject to the stay granted.

Accordingly, the following order is entered.

ORDER

AND NOW, this 24th day of March, 1997 after consideration of the record and of the written arguments of the parties as to respondent's preliminary objection to the petitioner's complaint filed as a matter of original jurisdiction

It is ordered that the preliminary objections of the Commonwealth of Pennsylvania, Bureau of Professional and Occupational Affair, respondent, are hereby sustained and the complaint of John K. Whiteford, petitioner, filed at the original jurisdiction of the Court is hereby dismissed.

s/ Eunice Ross, Senior Judge

APPENDIX-A3

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

JOHN K. WHITEFORD Petitioner v. COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS)	))))))))))	No.482 C.D. 1997

BEFORE:
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE CHARLES A. LORD, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE FRIEDMAN
FILED : JUNE 3, 1997

John K. Whiteford MD (Whiteford) appeals from an order of the State Board of Medicine (Board) which suspended Whiteford's license to practice medicine for a period of fourteen days, and imposed a $1,000 civil penalty, for Whiteford's failure to pay the 1995 Emergency Medical Malpractice Liability Insurance surcharge assessed by the Commissioner of the Medical Professional Liability Catastrophe Loss Fund (CAT Fund). 1

---

1 Section 701 of the Health Care Services Malpractice Act (Malpractice Act), Act of October 15, 1975 P.L.

390, as amended 40 P.S. 1301,701, which was subsequently amended in 1996, provided in pertinent part:

(e) (1) " The fund shall be funded by the levying of an annual surcharge... on all health care providers entitled to participate in the fund."

(3) "Notwithstanding the above provisions relating to annual surcharge, the commissioner shall have the authority...to determine and levy an emergency surcharge on all health care providers then entitled to participate in the fund."

(f) "the failure of any health care provider to comply with any of the provisions of this section...shall result in the suspension or revocation of the health care provider's license by the licensure board."

Moreover, section 39 of the Medical Practice Act of 1985 (MPA) of December 20, 1985, P.L. 457, 63 P.S. 422.39, provides in pertinent part:

(b) "civil penalties.- In addition to any other civil remedy...provided for in this Act, the board... may levy a civil penalty of up to $1000 on any current licensee who violates any provision of this act."

Whiteford holds a license to practice medicine and surgery in the Commonwealth. On April 23, 1996, the board served Whiteford with an Order to Show Cause why the board should not revoke or suspend his medical license for failure to pay the 1995 CAT Fund emergency surcharge and impose other penalties for violation of section 41(6) of the Medical Practice Act of 1985 (MPA). 2

2 Section 41 (6) of the MPA, 63 P.S. 422.41(6) provides that the Board shall have authority to impose disciplinary or corrective measures on a Board-regulated practitioner for violating a lawful regulation promulgated by the Board. Here, the Board alleged

that Whiteford violated it's regulation at 49 Pa. Code 16.31.35, which require compliance with section 701 of the Malpractice Act.

On September 3, 1996 Whiteford filed and Answer and New Matter to the Order to Show Cause. Therein, Whiteford requested that the board: (1) exempt him from buying malpractice insurance as a reward for practicing medicine for 29 years without committing malpractice; (2) Refund monies which he paid since 1968 for the purchase of malpractice insurance; (3) impose a voluntary moratorium on suspending the licenses of physicians who elect not to buy malpractice insurance; and (4) schedule a hearing on the matter. Whiteford also argued that, because mandatory malpractice insurance discriminates against innocent physicians, the Malpractice Act is unconstitutional.

A formal hearing was held before a hearing examiner on October 29, 1996. At the hearing, the Board submitted a Certificate and Attestation of Nonpayment to show that Whiteford failed to pay the 1995 emergency surcharge on his professional liability insurance in the amount of $2,281.00. Whiteford, who was not represented by counsel, testified: "I not only didn't pay that bill, I don't buy malpractice insurance anymore." (N.T. at 10-11.) Whiteford then argued before the Board that the Malpractice Act is and unconstitutional Bill of Attainder because it penalizes him for malpractice, a "crime" that he did not commit.

based on the evidence presented, the hearing examiner found Whiteford "guilty" of violating section 701(e) of the Malpractice Act, section 41(6) of the MPA and 49 Pa. Code 16.31-16.35. **3**

3 Although the statutes and regulations address crimes and respective punishments for an adjudication of guilt, the violation here is no more than civil in nature. Indeed, the penalties imposed by the board are civil penalties and are consistent with the law. Thus,

our disposition of this case is not affected by the hearing examiner's error in stating that Whiteford is guilty of a crime.

The hearing examiner thus ordered that Whiteford pay the $2,281.00 emergency surcharge and a $685.00 fine. the hearing examiner also suspended Whiteford's license for 12 days, or if Whiteford fails to pay the surcharge and fine, until Whiteford makes those payments.

On November 26,1996 Whiteford filed an Application for Review with the Board. Upon consideration of the matter, the Board adopted the adjudication of the hearing examiner and ordered that Whiteford's license be suspended for 14 days, that Whiteford's license not be reinstated until Whiteford presents proof of compliance with the Act, and that Whiteford pay a civil penalty of $1,000.00.

In his pro se appeal to this court, Whiteford raises the following issues:

1. Does the Pennsylvania Legislature have the power over court judgments to transfer punishments from those afforded Due Process and found liable in court to any other person group or race? If so, where is it written?
2. Does not such legislated transfer of punishment deny Due Process to the designated group, who are innocent until proven guilty?
3. Does not such transfer of punishment absolve those found liable in court? If this is a legislative pardon power, where is it written?
4. Do mandatory malpractice insurance premiums to $122,000 annually "Take" medical practices by such cost and violate Right to Work?
5. Are soaring inflationary, no-merit malpractice claims insurance fraud?
6. Is mandating only physicians pay the entire cost of soaring malpractice claims a violation of Equal

Protection, since all citizens benefit and 98.6% of physicians do not commit malpractice annually?

7. Is mandatory insurance the legislated end for the presumption of innocence, or are we just applying it selectively?

8. Would a rational legislative Act:

A. Spend 91 cents for every 9 cents to compensate victims?

B. Lead to 20% of Allegheny county physicians being accused of malpractice in annually?

C. Produce the highest malpractice rates in the country?

D. Be passed in response to an insurance threat in 1975?

E. Defeat, by design, it's stated purpose of "affordable" insurance? If the acts are unconstitutional, strike them as such.

(Whiteford's brief, Statement of the Issues.)

The Board has filed a Motion to Strike Petitioner's Brief and to dismiss Whiteford's petition for review. The Board Alleges, inter alia, that Whiteford's brief: (1) references facts not in evidence; **4**

4 The Board avers that Whiteford's brief makes reference to: (1) the percentage costs of malpractice; (2) rates of malpractice claims; (3) judgment payout ratios; and (4) a statistical analysis of malpractice incidence. The Board further alleges that Whiteford did not attempt to introduce such evidence at the hearing. (Board's Motion, paras 3-4)

(2) Does not contain a Statement of Jurisdiction, as required by Pa. R.A.P. 2114; (3) does not conform to Pa. R.A.P. 2116; **5**

5 Whiteford's Statement of the Issues encompasses more than one page. Pa. R.A.P. 2116 provides that the Statement of the Questions involved must never exceed one page.

(4) disregards the requirements of Pa. R.A.P. 2117; 6

6 Pa. R.A.P. 2117 (b) provides that the Statement of the Case shall not contain any argument; rather it shall contain a balanced presentation of the history of the proceedings and the respective contentions of the parties.

(5) raises arguments not raised before the board; and (6) improperly requests as relief that the Board reimburse money which Whiteford has paid to another agency. The Board states that Whiteford is not entitled to special deference because of his pro se status.

We agree with the Board that Whiteford's brief contains numerous substantial defects which impair our ability to conduct a meaningful review. Thus, we grant the Board's motion and quash this appeal without reaching the merits....

ORDER

AND NOW, this 3rd day of June 1997, the appeal of John K. Whiteford is quashed.

CERTIFIED FROM THE RECORD
AND ORDER EXIT

S/ Rochell A. Friedman

JUN 3 1997
s\ C.R.Hostutler
Deputy Prothonotary-Chief Clerk

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS)	) Docket No. 0300-49-96) File No. 96-49-01453)))

ORDER

AND NOW, this 4th day of June 1997 upon consideration of the Commonwealth Court Order issued June 3, 1997, the Board's Order of January 30, 1997, is **REINSTATED.** The license issued to respondent John K. Whiteford MD, License No. MD-011134E, is **SUSPENDED** for a period of fourteen (14) days during which time Respondent cannot practice medicine. Respondent must present to the Board proof of compliance with the provisions of the Malpractice Act from the CAT Fund to have his license reinstated at the conclusion of the period of suspension. Additionally, a $1,000.00 civil penalty is imposed on the Respondent. Respondent's license will remain suspended and will not be reinstated until the civil penalty is paid and the proof of compliance is filed.

The civil penalty must be paid by certified check or money order, made payable to the "Commonwealth of Pennsylvania" and sent to Board counsel, State Board of Medicine, P.O. Box 2649, Harrisburg, Pa. 17105-2649. The civil penalty is due on the effective date of this order.

Licensure documents shall be surrendered to the Board counsel at the above address.

This Order shall take effect immediately.

BY ORDER:
STATE BOARD OF MEDICINE
s/ Daniel B. Kimball JR. MD, Chairman

APPENDIX-A5

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BEFORE THE STATE BOARD OF MEDICINE

COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS)	) Docket No. 0300-49-96) File No. 96-49-01453))

ORDER

AND NOW, this 30th day of January 1997 the State Board of Medicine upon consideration of the foregoing findings of fact, conclusion of law and discussion, hereby Orders that the license issued to John K. Whiteford MD, License No. MD011134E, is suspended for a period of 14 days during which time Respondent cannot practice medicine. Respondent must present to the board proof of compliance with the provisions of the Malpractice Act from the CAT Fund to have his license reinstated at the conclusion of the period of suspension. Additionally, a $1000.00 civil penalty is imposed on Respondent. Respondent's license will remain suspended until the civil penalty is paid and proof of compliance is filed.

The civil penalty must be paid by certified check or money order and is due on the date of this order.

BY ORDER

BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

s/ Dorothy Childress
Commissioner

STATE BOARD OF MEDICINE

s/ Charles J. O'Bannon MD
Chairman

APPENDIX-A6

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

v.

John Kenney Whiteford

Docket No. 0300-49-96

ORDER

AND NOW, this 15 day of November 1996, upon consideration of the testimony given at the hearing held on October 29,2996, respondent is found guilty of the above cited violations. It is hereby ordered that:

1. Respondent shall pay the CAT Fund emergency surcharge n the amount of $2,281.00 no later than January 12, 1997.
2. Respondent shall pay a fine in the amount of $685.00 no later than January 12, 1997.
3. Respondent's license. number MD011134E, shall be suspended for a period of 12 days, starting t 12:00 AM on January 1, 1997. Said suspension shall end at 11:59 PM on January 12, 1997, if and only if, the above CAT Fund surcharge and fine are paid in full. In the event the above CAT Fund emergency surcharge and fine are not paid in full, said suspension shall remain in effect until such time as the CAT Fund emergency surcharge and fine are paid in full.

By Order: s/ Chere Winek-Shawer

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN K. WHITEFORD, Plaintiff	) CIVIL ACTION 96-1949
v,	)
COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS)	)

MEMORANDUM

LANCASTER J.

Plaintiff is a physician licensed to practice medicine in the Commonwealth of Pennsylvania. He alleges that defendant, Bureau of Professional and Occupational Affairs, has scheduled a hearing to suspend his medical license and impose fines for his failure to purchase malpractice insurance and to pay into the the Pennsylvania CAT Fund surcharge on that insurance.He contends that the Bureau's action is prohibited under Article I, Section 10, Clause 1 of the Constitution of the United States. Plaintiff seeks injunctive relief. The court will abstain from entertaining this claim.

The doctrine of abstention provides that a federal court may properly abstain from exercising its jurisdictional powers when to do so would impermissibly interfere with ongoing state proceedings. See generally Williams v. Red Bank Board of Education, 662 F. 2d 1008 (3rd Cir. 1981); New Jersey v. Chesimard, 555 F. 2d 63 (3rd Cir. 1977). In Younger v. Harris, 410 U.S. 37 (1971), the United States Supreme Court determined that the "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in

ongoing state judicial proceedings that concern important state interests." Younger v. Harris, 401 U.S. 37. Although decided in the context of criminal proceedings, the Younger doctrine is fully applicable in civil proceedings in which important state interests are involved. Moore v. Sims, 442 U.S. 415 (1979)

The instant action is clearly a request for this court to interfere with state court prodeedings. We will not do so. the Clerk of court is directed t mark this case closed.

BY THE COURT:
s/ Gary Lancaster

Dated: Januray 6, 1997
cc: All Counsel of Record

APPENDIX B2

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CASE NO. 97-3080

JOHN K. WHITEFORD,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; BUREAU OF PROFESSIONAL AND CCUPATIONAL AFFAIRS

On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 96-CV-01949)
District Judge: Hon. Gary L. Lancaster

Before: SLOVITER, Chief judge, McKEE and SEITZ, Circuit Judges

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JUDGMENT

This case came to be heard on the record from the United States District Court for Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1 (a) on August 1, 1997.

On consideration whereof, it is now ordered and adjudged by this Court that the judgment of the District Court entered January 7, 1997 be, and the same is, hereby affirmed. Costs taxed against Appellant.

Attest:
s/ B...J. A..(unreadable)
Chief Deputy Clerk

APPENDIX B3

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 97-3080

JOHN K. WHITEFORD,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA; BUREAU OF PROFESSIONAL AND CCUPATIONAL AFFAIRS

Present: MCKEE, Circuit Judge

1. **Motion filed by pro se appellant John K. Whiteford, MD for an extension of time to file petition for rehearing which may be construed as a petition for rehearing and motion to file petition out of time.**
2. **Atttached for the Court's information is a copy of the Memorandum Opinion that was filed August 5, 1997.**
3. **Any response to the above motion due by September 8, 1997.**

s/ Juanita Johnson
Case Manager-Direct Dial 215-597-5846

ORDER

The foregoing motion is/are:

GRANTED.

By the Court,
s/ McKee
Circuit Judge

Dated: September 9,1997

APPENDIX B4

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 97-3080

John K. Whiteford

v.

Commonwealth of Pennsylvania: Bureau of professional and Occupational Affairs

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER, STAPELTON, MANSMANN, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE and SEITZ*, Circuit Judges

The petition for rehearing filed by Appellant: John K. Whiteford in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, following the grant of the motion for an extension of time to file petition for rehearing, and no judge who concurred in the decision having asked for rrehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court;

s/ A.Sloviter
Chief Judge

Dated: Sept. 25, 1997

*Hon. colins J Seitz, Senior Circuit Judge, as to panel for rehearing only

APPENDIX C1

PHICO MALPRACTICE RATES 1995-EXCERPTS;

SPECIALTY	REGION	ANNUAL COST
Orthopedic Surgery	1 (Philadel.)	$33,645
Family Practice	1	$ 4,802

1995 Cat Fund Surcharge =168% of Basic coverage
1995 Emergency CAT Fund surcharge = 88% of Basic
1996 planned CAT surcharge was 254% of Basic coverage

NATIONAL PRACTITIONER DATA BANK 1995:

TABLE 6 Physician Malpractice payouts for 5.25 years	TABLE 10 Median	Mean	Calculated Annual Total
1. National: 71,801	$50,000	$148,685	$2 billion
2. Pa.: 5,839	$85,000	$153,590	$170,821

TABLE 5:

# payouts in 5.25 years for malpractice:	Practitioners with this # payouts: (dentists and physicians)
1	61,357
2	10,483
3	2,556
4	749
5	320
6	116
7	65
8	31
9	21
10	8
More than ten	71

(Entire NPDB 1995 report in 3rd Circuit Appeal)

APPENDIX C2

AMA SOCIOECONOMIC CHARACTERISTICS OF MEDICALPRACTICE 1996-EXCERPT:

TABLE 4: Average 1994 premium paid +4.6%=$15.800
x number or physician in US (NPDB) 611,217
Total premiums paid $9,657,228,000

THE AMA ANS US HEALTH POLICY: CHICAGO PRESS 1984-EXCERPT:

Page 512:

Year	Total malpractice premiums paid
"1960	$50,000,000"
1975 (interpolated)	$1,000,000,000
"1982	$1.200,000,000"
1995 (calculated)	$9,700,000,000